Dato' Wan Hashim bin Hj Wan Daud v Mazlan bin Ibrahim & Anor

HIGH COURT (KOTA BHARU) — CIVIL SUIT NO 22-58 OF 1996
ARIFIN ZAKARIA J
23 SEPTEMBER 1997

Civil Procedure *— Pleadings — Striking out writ and statement of claim — Whether claim ought to be struck out for failure to plead the words alleged to be defamatory — Whether claim ought to be struck out as words alleged to be defamatory was incapable of conveying such varied meanings as alleged — Whether claim ought to be struck out for failure to give particulars of malice — Whether plain and obvious case to be struck out for failure to comply with O 18 r 19 — Rules of the High Court 1980 O 18 r 19*

Civil Procedure *— Damages — Exemplary damages — Quantification of general damages — Whether exemplary damages can be quantified — Effect of failure to comply with O 18 r 8(3) of the English Supreme Court Practice 1977*

Pursuant to O 18 r 19 of the Rules of the High Court 1980 ('the RHC'), the second defendant applied to strike out the plaintiff's writ and statement of claim as against the second defendant. The second defendant raised four objections, namely: (i) the plaintiff in relying upon the words 'PAS Youth: Crisis is State Secretary's Fault' ('the captioned words') as being defamatory failed to plead the same and as such could not rely on the captioned words to support the plaintiff's case; (ii) the alleged defamatory words as pleaded in para (8) of the statement of claim had a wide range of natural and ordinary meanings and the alleged defamatory words were wholly incapable of conveying such varied meaning; (iii) the plaintiff failed to comply with the requirements of O 18 r 8(3) of the English Supreme Court Practice 1977 on quantification of exemplary damages; and (iv) para (6) of the pleadings failed to comply with O 78 r 3(3) of the RHC and the plaintiff failed to give particulars of the facts and matter from which malice was inferred. The senior assistant registrar dismissed the application with costs. Hence the appeal to the learned judge.

Held, dismissing the appeal:

(1) With regard to the first ground of objection, a closer scrutiny of the statement of claim would disclose that the plaintiff did indeed plead the captioned words in para (5) of the statement of claim. It could not be said that the statement of claim failed to disclose any reasonable cause of action as against the second defendant who was undeniably the publisher of the alleged defamatory words (see pp 180G–I and 181G).

(2) Having considered the alleged defamatory words, those same words could convey some, if not all, the meanings ascribed to them by the plaintiff and the form of pleading adopted by the plaintiff did not offend any principles or rules of pleading. There was nothing objectionable in the form of pleadings adopted by the plaintiff and the second ground of objection raised by the second defendant must be rejected (see p 182D–F).

(3) Since there was no equivalent provision to that of O 18 r 8(3) of the English Supreme Court Practice 1977, the second defendant's objection on the third ground could not succeed and exemplary damages may be quantified so as to obviate any element of surprise to a defendant (see p 182I).

(4) There was a distinction to be drawn between express malice and malice in law. Malice in law may be presumed from the fact of publication of defamatory words and a plaintiff need not prove it whereas express malice which is actual malice or malice in fact had to be pleaded or proved by a plaintiff. Order 78 r 3(3) of the RHC refers to express malice and not malice at law. In this case, as the plaintiff merely sought to rely on malice at law, there was no requirement to serve a reply to the second defendant's defence. The failure of the plaintiff to serve the reply would of course prevent the plaintiff from adducing evidence of actual malice which was necessary to rebut the defence of qualified privilege or fair comment raised by the second defendant. However, such a failure would not render the writ and statement of claim to be struck out under O 18 r 19 of the RHC (see p 183F–H).

[Bahasa Malaysia summary

Menurut A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), defendan kedua memohon untuk membatalkan writ dan pernyataan tuntutan plaintif terhadapnya. Defendan kedua membangkitkan empat bantahan, iaitu: (i) plaintif dalam bergantung kepada perkataan-perkataan 'PAS Youth: Crisis is State Secretary's Fault' ('perkataan-perkataan kapsyen') sebagai fitnah gagal menghujahkan yang sama dan oleh itu tidak boleh bergantung kepada perkataan-perkataan kapsyen untuk menyokong kes plaintif; (ii) kata-kata fitnah seperti yang diplidkan dalam perenggan (8) pernyataan tuntutan mempunyai makna biasa yang luas dan kata-kata fitnah yang dikatakan secara keseluruhan tidak mungkin menyampaikan makna demikian; (iii) plaintif gagal mematuhi keperluan A 18 k 8(3) English Supreme Court Practice 1977 mengenai pengiraan ganti rugi teladan; dan (iv) perenggan (6) pliding gagal mematuhi A 78 k 3(3) KMT dan plaintif gagal memberi butir-butir tentang fakta dan perkara dari mana niat jahat disimpulkan. Penolong kanan pendaftar menolak permohonan dengan kos. Maka rayuan dibuat kepada hakim yang arif.

Diputuskan, menolak rayuan:

(1) Berkaitan dengan alasan bantahan yang pertama, suatu penelitian pernyataan tuntutan mendedahkan bahawa plaintif memang telah memplidkan perkataan-perkataan kapsyen dalam perenggan (5) pernyataan tuntutan. Ia tidak boleh dikatakan bahawa pernyataan tuntutan gagal mendedahkan sebarang kausa tindakan yang munasabah terhadap defendan kedua yang tidak boleh dinafikan merupakan penerbit kata-kata fitnah yang dikatakan (lihat ms 180G–I dan 181G).

(2) Setelah mempertimbangkan kata-kata fitnah yang dikatakan, kata-kata yang sama boleh menyampaikan beberapa, jika tidak

semuanya, makna yang diberikan oleh plaintif dan bentuk pliding yang diterima-pakai oleh plaintif tidak melanggar sebarang prinsip atau rukun pliding. Tiada apa-apa bantahan atas bentuk pliding yang diterima-pakai oleh plaintif dan alasan bantahan kedua yang dibangkitkan oleh defendan kedua mesti ditolak (lihat ms 182D–F).

(3) Oleh kerana tiada peruntukan yang setara dengan A 18 k 8(3) English Supreme Court Practice 1977, bantahan defendan kedua terhadap alasan ketiga tidak boleh berjaya dan ganti rugi teladan boleh dikira supaya boleh mengelak sebarang unsur kejutan kepada pihak defendan (lihat ms 182I).

(4) Terdapat perbezaan di antara niat jahat nyata dan niat jahat dalam undang-undang. Niat jahat dalam undang-undang boleh dianggap daripada fakta penerbitan kata-kata fitnah dan seorang plaintif tidak perlu membuktikannya manakala niat jahat nyata yang merupakan niat jahat sebenar atau niat jahat dalam undang-undang hendaklah diplidkan atau dibuktikan oleh plaintif. Aturan 78 k 3(3) KMT merujuk kepada niat jahat nyata dan bukan niat jahat dalam undang-undang. Dalam kes ini, oleh kerana plaintif cuma ingin bergantung kepada niat jahat dalam undang-undang, tiada keperluan untuk menyampaikan jawapan kepada pembelaan defendan kedua. Kegagalan plaintif untuk menyampaikan jawapan sudah tentu akan menghalang plaintif daripada mengemukakan keterangan niat jahat sebenar yang perlu untuk mematahkan pembelaan perlindungan bersyarat atau komen berpatutan yang dibangkitkan oleh defendan kedua. Namun demikian, kegagalan sedemikian tidak akan menyebabkan writ dan pernyataan tuntutan dibatalkan di bawah A 18 k 19 KMT (lihat ms 183F–H).]

Notes

For cases on striking out writ and statement of claim, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2754–2765.

For cases on damages, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1097–1103.

Cases referred to

AJA Peter v OG Nio & Ors [1980] 1 MLJ 226 (refd)

Abu Bakar bin Haji Yusuf v Mohamed Hamzah bin Hanapiah & Anor [1978] 2 MLJ 78 (refd)

Bank of China v Asiaweek Ltd [1991] 2 MLJ 505 (refd)

Belt v Lawes (1882) 51 LJQB 359 (refd)

CC Ng & Brothers Sdn Bhd v Government of State of Pahang [1985] 1 MLJ 347 (refd)

Collins v Jones [1955] 2 All ER 145 (refd)

Dato' V Kanagalingam v Tommy Thomas & Anor & another case [1997] 5 MLJ 229 (refd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105 (refd)

Ong Lean Sim & Anor v Tio Kah Hin & Ors [1985] 1 MLJ 270 (refd)
Rajagopal v Rajan [1972] 1 MLJ 45 (refd)
Rediffusion (Hong Kong) Ltd v A-G of Hong Kong [1970] AC 1136 (refd)
Slim & Ors v Daily Telegraph Ltd & Ors [1968] 2 QB 157 (refd)

Legislation referred to

Defamation Act 1957
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), O 78 r 3(3)
Supreme Court Practice 1977 O 18 r 8(3) [UK]

Mohd Apandi bin Ali (*Apandi Ali & Co*) for the plaintiff.
Peter Raj (*VK Lingam & Co*) for the defendant.

Arifin Zakaria J: This is an appeal against the decision of the learned senior assistant registrar dismissing the second defendant's application to strike out the plaintiff's writ of summons and statement of claim under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). The second defendant specifically relies on grounds (a), (b) and (c) of para (1) of the rule. The application is supported by the affidavit of Ahmad Rejal Arbee, the executive director and editor-in-chief of the second defendant.

At the outset, I should state that as a general rule it is only in plain and obvious cases that recourse should be had to this summary procedure. The mere fact that the case is weak and unlikely to succeed is no ground for striking out the pleading (see *Abu Bakar bin Haji Yusuf v Mohamed Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78). Mohamed Dzaiddin J (as he then was) in *Ong Lean Sim & Anor v Tio Kah Hin & Ors* [1985] 1 MLJ 271 at p 272 said:

> ... that it is only in plain and obvious cases that recourse should be had to summary procedure under this rule and the powers conferred by this rule will only be exercised where the case is clear beyond doubt.

In *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105, the Federal Court expressed a similar view at p 109 where it said:

> It cannot be gainsaid that under O 18 r 19 pleadings will only be struck out in plain and obvious cases. So long as the statement of claim discloses some ground of action, the mere fact that the plaintiff is unlikely to succeed at the trial is no ground for striking out: see *Mooney v Peat Marwick & Mitchell & Co* [1967] 1 MLJ 87.

We need only refer to a passage from another authority referred to by learned counsel, that is the Privy Council decision in *Rediffusion (Hong Kong) Ltd v A-G of Hong Kong* [1970] AC 1136 where at pp 1158 and 1159, it said:

> It is a well established principle that the summary power under RSC O 18 r 19 to strike out a writ or pleading as disclosing no reasonable cause of action or defence should be exercised only in plain and obvious cases.

...

No evidence is admissible on the cause of action summons ... the only documents that can be looked at are the writ, the documents referred to in the writ ... .

In *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347, the Federal Court at p 350 again expressed the view that:

> The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution [per Lord Diplock in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1].

In this case, the writ and the statement of claim had been attacked essentially on four grounds. I shall deal with these grounds in turn.

Firstly, learned counsel for the second defendant submitted that the plaintiff, as it appears from the affidavit-in-reply, is relying upon the words in the caption 'PAS Youth: Crisis is State Secretary's Fault' as being defamatory. He contended that the words in the said caption had not been pleaded by the plaintiff and therefore the plaintiff could not rely on those words in support of his case. He cited the case of *Collins v Jones* [1955] 2 All ER 145 as authority, wherein at p 146 it was stated:

> In a libel action, it is essential to know the very words on which the plaintiff founds his claim. As Lord Coleridge CJ said in *Harris v Warre* (1879) 4 CPD 125 at p 128:
>
> 'In libel and slander, everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between words of the libel or slander set out in the declaration and the proof of them ... . In libel and slander, the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions, but the fact of his having used those defamatory expressions alleged, which is the fact on which the case depends.'

However, a close scrutiny of the statement of claim would disclose that the plaintiff did in fact plead the words in the caption. This is found in para (5) of the statement of claim which reads as follows:

> (5) Dalam keluaran akhbar *The Sun* bertarikh 3 Mei 1996 itu, di bawah tajuk 'PAS Youth: Crisis is State Secretary's Fault' defendan kedua telah menyiar dan mencetak kenyataan oleh defendan pertama dalam bahasa Inggeris dengan pernyataan berikut:
>
> 'The Kota Bharu PAS Youth has accused State Secretary Datuk Wan Hashim Wan Daud of triggering off the crisis with the state government.
>
> The problem started when Hashim apparently used his authority to transfer administrative officers, creating what the division's youth chief Mazlan Ibrahim called defects in administration.'

It is therefore incorrect to say that the words in the caption were not pleaded by the plaintiff as demonstrated by para (5) above.

A The plaintiff in para (6) alleged that the said statement in the newspaper (including the words in the caption) was libellous and intended to bring down the reputation and good name of the plaintiff. The issue is: does the pleading as it stands disclose any reasonable cause of action against the second defendant? The second defendant never denied that those words were in fact published by it as claimed by the plaintiff.

B

The task of the court at this stage is to consider the statement of claim alone and to see whether it discloses any reasonable cause of action against the second defendant. The proper approach to this is as stated by the Federal Court in *Rajagopal v Rajan* [1972] 1 MLJ 45 at p 47:

C

> In deciding whether the words complained of were per se defamatory, it would be necessary to construe the words in their natural and ordinary meaning in the sense in which reasonable men of ordinary intelligence would be likely to understand them. Where ... the words complained of have a secondary meaning by innuendo, consideration must be taken as to the manner of their publication and the persons to whom they were published.

D And further down the same page, the court said:

> It is not what the appellant meant that is relevant in construing whether the words are defamatory but what the words convey to a reasonable person to whom they are published.

E In *AJA Peter v OG Nio & Ors* [1980] 1 MLJ 226 at p 233, Abdul Hamid J (as he then was) again reiterated the correct approach to the issue:

> It is apparent that the recognized approach is 'that as the law of defamation is concerned with the effect of the words used on ordinary people, account must be taken of the fact that the layman's capacity for implication is much greater than the lawyer's. And further, in some cases there may be special
> F facts or circumstances known only to a limited number of people which for these people give the words used a special meaning or meanings'.

Having regard to the above authorities, I am of the opinion that it cannot rightly be said that the statement of claim herein fails to disclose any reasonable cause of action against the second defendant who undeniably is
G the publisher of the alleged defamatory words. For those reasons, I dismissed the second defendant's objection on the first ground.

The second ground relied upon by the second defendant is that the plaintiff at para (8) of the statement of claim pleaded that the alleged defamatory words have a wide range of natural and ordinary meanings as
H stated therein, namely:

(a) plaintif adalah seorang yang tidak beretika dalam menjalankan tugas;

(b) plaintif telah bertanggungjawab di atas kewujudan krisis pentadbiran dalam Negeri Kelantan;

(c) plaintif adalah seorang yang tidak jujur;

I (d) plaintif adalah seorang Setiausaha Kerajaan Negeri yang buruk dan keji;

(e) plaintif tidak layak untuk memegang jawatan sebagai Setiausaha Kerajaan Negeri;

(f) plaintif adalah seorang yang tidak boleh dipercayai; A

(g) plaintif adalah seorang yang suka menyalahgunakan kuasa; dan

(h) plaintif adalah seorang pengacau.

Learned counsel referred me to the case of *Bank of China v Asiaweek Ltd* [1991] 2 MLJ 505 where at p 508 Thean J said: B

> The plaintiff in para (5) of the statement of claim ascribed to the words no less than six meanings cumulatively (the details of which I have earlier set out). I do not think that to ordinary reasonable persons the words would convey such a comprehensive range of meanings.

Learned counsel for the second defendant contended the plaintiff cannot ascribe ten varied, natural and ordinary meanings to the alleged defamatory words as set out in para (8) of the plaintiff's statement of claim as this is a wholly unreasonable interpretation and the alleged defamatory words are totally incapable of conveying such varied meanings. Having considered the alleged defamatory words, I am of the opinion that those words could convey some if not all of the meanings ascribed to them by the plaintiff. I find that the form of pleading adopted by the plaintiff herein does not offend any principle or rule of pleading that I am aware of. Lord Denning MR in *Slim & Ors v Daily Telegraph Ltd & Ors* [1968] 2 QB 157 at p 169 said: C D

> In such case, the customary form of pleading has been for the pleader to say: 'The said words meant and were understood to mean' so and so, setting out all the derogatory imputations that he can think of. Such has always been the practice to my certain knowledge. E

Therefore, in my judgment there is nothing objectionable in the form of pleading adopted by the plaintiff in the instant case. For the above reasons, the second ground of objection raised by the second defendant must be rejected. F

The third ground of objection on the plaintiff's pleading (which was erroneously stated as the fourth ground) is that the plaintiff has failed to comply with the requirements of O 18 r 8(3) of the Supreme Court Practice 1977. Learned counsel was referring to the English Supreme Court Practice 1977. There is no equivalent provision in the RHC. The plaintiff's counsel submitted that exemplary damages like compensatory or aggravated damages is part of general damages and as such, is claimable and quantifiable. On the authority of the case of *Dato' V Kanagalingam v Tommy Thomas & Anor & another case* [1997] 5 MLJ 229, he submitted that there are no specific provisions in the relevant statutes — namely, the Defamation Act 1957 and the RHC — that prohibit the plaintiff from quantifying exemplary damages. G H

Since there is no equivalent provision to that of O 18 r 8(3) of the English Supreme Court Practice in the RHC, therefore the defendant's objection on this ground cannot succeed. On the quantification of the exemplary damages, I agree with Rahmah Hussain J that it may be quantified so as to obviate any element of surprise to the defendant. I

A Finally, the second defendant contended that the pleading in para (6) of the statement of claim is defective in failing to comply with O 78 r 3(3) of the RHC. Para 6 reads as follows:

> Pernyataan-pernyataan di dalam akhbar tersebut adalah suatu fitnah semata-mata yang bertujuan untuk menjatuhkan maruah dan nama baik plaintif.

B The second defendant contended that the plaintiff is implying malice on the part of the second defendant. He submitted under O 78 r 3(3) of the RHC the plaintiff is required to give particulars of the facts and matters from which malice is inferred. No such particulars had been given by the plaintiff and therefore, the second defendant contended, the plaintiff's claim C on this ground should be struck out. Order 78 r 3(3) of the RHC provides:

> Where in an action for libel or slander, the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were D published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

The plaintiff's counsel in his reply submitted that para (6) of the statement of claim does not contain any allegation of express malice or malice in fact. E What was alleged by the plaintiff was just a formal malice or malice in law. Therefore, he contended no reply as required by r 3(3) of O 78 needed to be served on the defendant.

From the authorities, there is a distinction drawn between express malice and malice in law. The latter kind of malice may be presumed from F the fact of the publication of defamatory words, so that the plaintiff need not prove it (see *Belt v Lawes* (1882) 51 LJQB 359 (DC)); whereas express malice which is actual malice or malice in fact has to be pleaded and proven by the plaintiff. I agree with the submission of learned counsel for the plaintiff that O 78 r 3(3) of the RHC refers to this latter kind of malice and not to malice in law. Therefore, if the plaintiff merely seeks to rely on G malice in law there is no requirement for the plaintiff to serve a reply to the defendant's defence. The failure of the plaintiff to serve a reply to the defence would of course prevent the plaintiff from adducing evidence of actual malice which is necessary in order to rebut the defence of qualified privilege or fair comment raised by the second defendant. However, such H a failure would not render the writ and the statement claim to be struck out under O 18 r 19 of the RHC.

For the reasons given above, I dismissed the second defendant's application with costs.

I *Application dismissed.*

Reported by Lew Chee Seong